



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2015-0020]

Buy America Handbook – Conducting Pre-Award and Post-Delivery Audits for Rolling Stock Procurements

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of availability of Handbook.

SUMMARY: The Federal Transit Administration (FTA) has placed in the docket and on its Web site guidance, in the form of a Handbook, on complying with FTA's Buy America pre-award and post-delivery audit requirements for revenue service rolling stock procurements, from the solicitation phase through final acceptance of the rolling stock. The Handbook explains and illustrates how to calculate domestic content of rolling stock, and is intended for use by recipients of FTA funding, auditors, manufacturers, and suppliers (including subcontractors).

DATES: The Handbook becomes effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For program questions, Patrick Centolanzi, FTA Office of Program Management, at (202) 366-0234 or Patrick.Centolanzi@dot.gov. For legal questions, Cecelia Comito, FTA Office of Chief Counsel, at (202) 366-4011 or Cecelia.Comito@dot.gov.

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I. Overview

FTA's objective in implementing 49 CFR part 661 (Buy America Requirements) and 49 CFR part 663 (Pre-Award and Post-Delivery Audits of Rolling Stock Purchases) is to support and promote the United States (U.S.) manufacturing industry and U.S. jobs. As guidance on the pre-award and post-delivery audit requirements for rolling stock procurements, FTA published two separate Buy America handbooks in May 1995—i.e., one for rail vehicle procurements and one for bus procurements.

Over the past several years, FTA has conducted Buy America Compliance Reviews, during which FTA observed and monitored the pre-award and post-delivery audit processes for fourteen capital grants. One primary finding was that FTA should provide more guidance and clarity on conducting pre-award and post-delivery Buy America audits as required in FTA's Buy America regulations (49 CFR parts 661 and 663).

As a result of that finding, FTA is issuing a new Buy America Handbook, entitled Conducting Pre-Award and Post-Delivery Audits for Rolling Stock Procurements (Handbook), which replaces the two Buy America handbooks on this subject from 1995.

On June 16, 2015, FTA issued a notice of availability of the proposed handbook in the **Federal Register** (80 FR 34487) and requested public comment on the Handbook. The comment period closed on August 17, 2015. FTA received comments from 28 entities, including trade associations, State DOT's, metropolitan planning organizations, public transportation providers, manufacturers, and individuals. This notice addresses the comments received and explains the changes FTA made to the proposed handbook in response to the comments.

The updated Buy America Handbook explains to recipients how to verify and document compliance with FTA's Buy America pre-award and post-delivery audit requirements. In addition, the Handbook encourages recipients, manufacturers, and suppliers to adopt certain best practices to ensure compliance with the pre-award and post-delivery audit requirements. The Handbook applies only to rolling stock procurements that are subject to the pre-award and post-delivery audit requirements set forth in 49 CFR part 663.

This notice provides a summary of the comments received regarding the proposed Handbook and the changes made to the Handbook in response to those comments. The Handbook is not included in this notice; instead, the Handbook is available on FTA's Web site, at <https://www.transit.dot.gov/buyamerica>, and in the docket, at www.regulations.gov (Docket No. FTA-2015-0020). Paper copies of the Handbook may be obtained by contacting FTA's Administrative Services Help Desk, at (202) 366-4865.

III. Comment Summary

A. General

Several commenters suggested changes for provisions in the Handbook that are identical to regulatory provisions in 49 CFR parts 661 and 663. FTA has not accepted any of these suggested changes as the rules can only be amended through the rulemaking process. However, where a careful read showed that the Handbook was not consistent with the regulations, we have made those changes to the Handbook to ensure the Handbook tracks the regulations. In addition, some commenters took the opportunity of a public comment process on the Handbook to make recommendations for amendments to FTA's Buy America regulation. FTA expects to update the Buy America regulation in the near future, and will consider comments received to the Handbook when developing the notice of proposed rulemaking.

A number of comments were outside the scope of the notice and thus are not addressed here. For example, a commenter recommended we include language in the Handbook from the DRIVE Act, which did not become law; however, we have updated the Handbook to reflect changes to 49 U.S.C. chapter 53, as amended by the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, Dec. 4, 2015. A number of commenters made editorial suggestions, which in many cases we accepted. Further, commenters asserted in a number of instances that the proposed Handbook went beyond the Buy America regulations. While we have not discussed each instance in this notice, we have thoroughly and carefully reviewed the Handbook to ensure it does not implicitly or explicitly require more than what is required by the regulations.

Throughout the document, FTA has made edits consistent with changes the FAST Act made to 49 U.S.C. 5323(j). For example, the Handbook no longer refers to "more than 60 percent of the cost" and instead refers to "more than the minimum percentage set

forth in 49 U.S.C. 5323(j)(2)(C)(i),” or similar language, to reflect the phasing in of higher minimum domestic content percentages for rolling stock between FY 2016 and FY 2020. As a second example, in section 1.2, Background, we added language from a new provision in 49 U.S.C. 5323(j)(5) that permits the cost of steel or iron that is produced in the United States and used in rolling stock frames or car shells that are produced outside of the United States to be included in the calculation of the domestic content of the rolling stock when the average cost of a vehicle in the procurement exceeds \$300,000.

B. Section 1 – Introduction

Section 1 of the proposed Handbook is an introductory chapter that provides a brief overview of the pre-award and post-delivery audit requirements set forth in 49 CFR parts 661 and 663, summarizes the contents of each subsequent section of the Handbook, and includes lists of relevant legal references, definitions, and acronyms.

Several commenters suggested that FTA clarify the Handbook applies only to new vehicles, and not to overhauls, rebuilds, or refurbished vehicles. We have clarified this in Subsection 1.1, Scope, and this notice therefore does not respond to comments inquiring as to how various provisions in the Handbook apply to overhauls, rebuilds, or refurbished vehicles, as those comments are outside the scope of the Handbook. We have also clarified that while Buy America requirements apply to support vehicles, the pre-award and post-delivery audit requirements apply only to vehicles used in revenue service.

Several commenters sought clarification on some of the defined terms used in the Handbook. Most of these comments related to terms that are defined in 49 CFR parts 661 and 663, and, as stated previously, FTA cannot make changes to those definitions

outside of a rulemaking process. FTA has reviewed the definitions to ensure they are consistent with the regulations and made edits as appropriate. One commenter sought clarity on the use of the word “independent” in the definition of the term auditor; we have amended the definition to be consistent with the use of the term in the text of the Handbook, and the definition now states the auditor must be independent from the manufacturer and the manufacturer’s agents.

C. Section 2 – Pre-Award Audit

Section 2 describes the pre-award audit requirements set forth in 49 CFR 663.21–27 and explains that the recipient must ensure the pre-award audit is complete before the recipient enters into a formal contract for the purchase of rolling stock. Pursuant to 49 CFR 663.23, the pre-award audit must include: a Pre-Award Buy America Certification, a Pre-Award Purchaser’s Requirements Certification, and, where appropriate, a Pre-Award Certification of Compliance with or Inapplicability of Federal Motor Vehicle Safety Standards (FMVSS).

Two commenters sought clarity on how to determine whether an auditor is “qualified.” FTA has not attempted to define who is a “qualified” auditor in the Handbook, and instead relies on its recipients to make that determination. One commenter asked what “independent from the procurement process” means; specifically, whether an entity that develops and writes the specifications for a procurement would be barred from conducting Buy America audits. The original intent was that the auditor be independent from the manufacturer; we have amended the text of the Handbook by removing the requirement that an auditor be independent from the procurement process.

Several commenters had questions related to Buy America waivers. Two commenters asked what timeframe should be allowed to request, and be granted, a Buy America waiver. Some commenters wanted to know how far in advance a Buy America waiver should be requested before the contract is awarded. FTA cannot provide a definitive timeline for processing waiver requests, and recommends recipients make those requests as soon as they can. One commenter stated the Handbook was not clear as to whether waivers applied to components or to the whole vehicle. Another commenter questioned the assertion in the Handbook that a price differential waiver may be granted if including the domestic material would increase the cost of the overall project by more than 25 percent, stating the regulation provides the waiver may be granted if the price of a single component is increased by 25 percent. The discussion of Buy America waivers in section 2.2.1 of the Handbook has been revised to clarify the applicability of the three statutory waivers in 49 U.S.C. 5323(j)(2) to rolling stock procurements. By statute, the procurement of rolling stock is subject to a waiver from the requirement that manufactured goods must contain 100 percent domestic content. Section 5323(j)(2)(C) allows FTA to waive Buy America requirements for rolling stock procurements by permitting domestic content less than 100 percent. The Buy America statute also includes three additional waivers: public interest waivers; non-availability waivers; and price differential waivers. The procedures for applying for each statutory waiver are set forth in 49 CFR 661.7. Only waivers based on public interest or non-availability may be granted for a component or subcomponent in the case of the procurement of rolling stock. 49 CFR 661.7(f).

Public interest and non-availability waivers under 49 CFR 661.7(f) may be granted for components and subcomponents of rolling stock, and if a waiver is granted, the component or subcomponent will be considered to be of domestic origin for purposes of calculating the domestic content of the vehicle. Generally, recipients, not the manufacturer, must apply for the Buy America waiver. However, a potential bidder, offeror or supplier may seek a public interest or non-availability waiver for a component or subcomponent.

Several commenters expressed concern about the level of documentation that recipients should review and maintain. The language in the Handbook in section 2.2.1. and 2.2.2, listing the documents the recipient must review and maintain for the procurement, closely tracks the regulation at 49 CFR part 663, in particular §§ 663.23, 663.25, and Appendix D to 49 CFR § 661.11. Further, an auditor must review the manufacturer's documentation that provides support for the stated costs of the components, subcomponents, and final assembly. This is part of the auditing process – verifying that the represented costs are accurate. If the manufacturer declines to provide supporting documentation for component and subcomponent costs, the Buy America domestic content cannot be verified, and the auditor will need to include this information in the pre-award audit report. The auditor needs to review enough supporting documentation to be satisfied that the vehicles will be compliant with Buy America requirements. FTA has amended the Handbook text in subsection 2.2.2. to provide guidance on maintaining confidentiality of manufacturer's proprietary information.

Commenters had similar questions about auditors reviewing documentation related to final assembly. Notably, the list of items to review is a suggested list (“...the

auditor may perform due diligence through a variety of methods, including ...”). One commenter suggested that including proposed final assembly costs in the Pre-Award Buy America Compliance Certification is not required by the regulation. Section 663.25 of title 49, CFR, specifically requires the recipient or its auditor to review “a description of the activities that will take place at the final assembly point and the cost of final assembly.” For pre-award, FTA acknowledges these will be estimated costs, and the Handbook uses the words “proposed” and “estimated.”

Some manufacturers also had concerns about how they could confirm their suppliers’ compliance with Buy America, stating they rely on their supplier’s certification of compliance, particularly given the large number of suppliers, components and subcomponents. Some objected to the recommended best practices identified in subsection 2.2.3.4. for confirming compliance. To the extent the manufacturer is asserting that components and subcomponents should be calculated as part of the domestic content of a vehicle, the manufacturer needs to be confident that its suppliers have provided compliant parts. The manufacturer will need to determine whether to take additional steps to confirm compliance with Buy America. FTA has provided some recommendations in the Handbook; this is neither an exhaustive list nor a list of required activities. One commenter suggested that FTA should require manufacturers to obtain executed certifications of compliance from their suppliers, as opposed to FTA simply recommending that manufacturers obtain such certifications. FTA has not made this a requirement in the past and it is not a requirement in the regulations, so we have maintained the provision in the Handbook as a recommendation.

One commenter objected to language in subsection 2.3.2.2. that suggests recipients should verify a manufacturer's financial viability as part of the review to certify compliance with the pre-award requirements. The commenter asserted this statement does not belong in the Buy America Handbook. Under 49 CFR § 663.27, Pre-award purchaser's requirements certification, the recipient must keep on file a certification that the proposed manufacturer is a "responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification set forth in the recipient's solicitation." Financial viability is an important characteristic of a "responsible manufacturer," and FTA has retained the language.

D. Section 3 – Post-Delivery Audit

Section 3 describes the post-delivery audit requirements set forth in 49 CFR §§ 663.31–39. It explains that the recipient must ensure the post-delivery audit is complete after the rolling stock is delivered to the recipient but before title to the rolling stock is transferred to the recipient, or before the rolling stock is put into revenue service, whichever comes first. Pursuant to 49 CFR 663.33, the post-delivery audit must include: a Post-Delivery Buy America Certification, a Post-Delivery Purchaser's Requirements Certification (based upon a review of the Resident Inspector's Report pursuant to 49 CFR 663.37), and a Post-Delivery Certification of FMVSS Compliance or Inapplicability, where appropriate. This section explains the requisite processes and documentation requirements for each of the post-delivery audit certifications listed above.

This section also describes best practices to aid recipients, manufacturers, and suppliers in achieving compliance with the post-delivery audit requirements, including guidance on how to prepare the requisite Resident Inspector's Report and supporting

documentation, in accordance with 49 CFR 663.37, and procedures for effectively verifying compliance with the domestic content and U.S. final assembly requirements.

Several commenters noted inconsistencies in how the proposed Handbook described the post-delivery period. We have amended the Handbook to track the language used in the regulation. In response to comments, we have clarified that Post-Delivery Domestic Content Monitoring (also described as “intermediate audits”) is a recommended best practice that would occur after the vehicle manufacturer delivers the first vehicle to the recipient and until the vehicle manufacturer transfers title to the last vehicle to the recipient or the recipient puts the last vehicle into revenue service, whichever is first. Specifically, FTA added subsection 3.1.3.4 to the Handbook to address the concerns regarding post-delivery monitoring raised by the commenters.

Several commenters expressed concern regarding the possibility of having to produce proprietary information to show Buy America compliance. FTA has amended the Handbook to address these concerns, in sections 2 and 3 and an added “FAQ” in section 5. If a manufacturer is concerned about releasing proprietary information, the manufacturer and recipient may agree that the recipient will contract with an external consultant to conduct the manufacturer’s Buy America certification review. Alternatively, the recipient may be able to keep its Buy America audit function independent by using a “firewall” and assuring the manufacturer that those employees of the recipient performing the Buy America audit are prohibited from disclosing any of the manufacturer’s proprietary data. Further, the review of documents may occur at the manufacturer’s place of business. There is no requirement that the recipient or its auditors obtain copies of the documents; they need simply to review them. Whether

conducted by a contractor or the recipient's employees, the manufacturer may require the reviewer to sign a non-disclosure agreement prior to reviewing the documents.

We also have amended the Handbook to track the regulation with regard to the information the recipient must keep on file. The recipient is not required to maintain a list of components and subcomponents and their costs for a procured vehicle – the recipient is required to review that information (as provided by the manufacturer), or have an independent auditor review that information, and certify that it is satisfied that the rolling stock meets the Buy America requirements.

One commenter asked if a Post-Delivery Audit is required if FTA granted a waiver from the Buy America requirements. There may be situations in which a full or partial audit would still be required, and FTA will address post-delivery audit requirements in the letter granting any waiver from Buy America requirements. In the event FTA issues a general waiver for a certain class of vehicles, if the **Federal Register** notice describing the waiver does not discuss pre-award or post-delivery audit requirements, recipients are encouraged to contact their FTA regional office for assistance. The same commenter asked for what purpose is the cost of final assembly used. Reviewing the cost of final assembly helps to verify the manufacturer is completing the activities that are required in final assembly, and the regulation at 49 CFR 663.25(b) requires recipients or their auditors to verify these costs.

As with other sections of the Handbook, FTA has made edits to clarify intent, to ensure consistency with the regulations, and to improve readability.

E. Section 4 – Domestic Content Calculations

This section provides guidance on how to calculate domestic content correctly for rolling stock procurements in accordance with 49 CFR 661.11, providing guidance relevant to both the pre-award audit and the post-delivery audit.

The introductory portion of this section has been amended to better explain how to conduct a proper Domestic Content Calculation consistent with 49 CFR 661.11. FTA has observed that some recipients and vendors, or their agents or auditors, are calculating the domestic content amount by dividing the total costs of the domestic components by the estimated value of the vehicle, found by subtracting certain costs from the Contract Total Price of the vehicles. This calculation is not consistent with 49 CFR 661.11 and fails to demonstrate compliance. Additional information is included to add instruction for doing a proper Domestic Content Calculation consistent with 49 CFR 661.11.

Commenters generally objected to the inclusion of the total contract price or total vehicle cost in the analysis, as those values are not relevant to the Buy America domestic content calculations, which are based on vehicle material costs. FTA agrees with commenters and we have removed the subsections addressing these values, and have also removed references to the total contract price and total vehicle cost from the rest of the Handbook.

In response to comments, we have made edits to subsection 4.3, which provides a sample Domestic Content Worksheet with detailed step-by-step instructions for how to fill out the worksheet and calculate domestic content. Commenters generally sought clarification on the required domestic content and how that calculation affects the step by step analysis in the worksheet. Similarly, the commenters raised questions about how the cost of the components (foreign and domestic) and subcomponents affect the

calculations. We have included references to the regulations as well as additional text to add clarity to the spreadsheets.

A number of commenters objected to the list of “Non-Recurring Expenses” or NREs, described in subsection 4.4. As with the total contract price and total vehicle price, FTA agrees with commenters that these values are not necessary for the calculation of domestic content for Buy America purposes. Given the regulation describes the cost of a component or subcomponent as the price a bidder or offeror pays, the NREs are already captured in the retail price of the component or subcomponent.

As with other sections of the Handbook, FTA has made edits in section 4 for clarity and consistency with the regulations.

F. Section 5 – Frequently Asked Questions

Section 5 addresses some of the most frequently asked questions (FAQs) about pre-award and post-delivery audits. Among numerous other topics, the FAQs concern what types of rolling stock are not subject to the pre-award and post-delivery audit requirements; how to calculate domestic content; and the responsibilities of the resident inspector. The majority of comments to this section addressed inconsistencies or perceived inconsistencies between the FAQs and the rest of the Handbook, the regulations, or the statute. FTA has carefully reviewed section 5 and made edits as appropriate. In addition, for clarity, we have added the regulatory citations to the FAQs where appropriate, and, at the suggestion of commenters, added an FAQ related to confidentiality of manufacturer’s proprietary information.

G. Appendices

The proposed Handbook contained four appendices. The appendices provide sample forms, spreadsheets and format for a resident inspector's report. These are samples only and, with the exception of the two Buy America certification forms (B.1 and B.2) in Appendix B, which are required by the regulations, recipients may choose to use their own forms, spreadsheets, and format for the resident inspector's report, provided the recipient's forms, etc., contain the information required by the regulations.

In the proposed Handbook, FTA included Appendix A, which contained domestic content calculation worksheets, including one worksheet for rail vehicles and one worksheet for buses. Commenters noted that some of the identified "components" in Appendix A are not included in Appendices B and C to 49 CFR 661.11. Commenters asserted that, absent a rulemaking, the components included in Appendix A of the Handbook should track the appendices to section 661.11. While Appendices B and C to section 661.11 note that the list of components is not exhaustive, FTA agrees that the Handbook is not the appropriate vehicle to "officially" expand on that list. Given that Appendix A contained information not consistent with the regulations, and that Section 4 contains step-by-step instructions for calculating domestic content, we have removed Appendix A in its entirety and re-numbered the other three appendices accordingly.

Appendix A in the final Handbook, as so re-numbered, contains sample compliance checklists for recipients, manufacturers, and suppliers to use in order to ensure that the Pre-Award and Post-Delivery Buy America Certifications and Purchaser's Requirements Certifications are properly completed. This appendix also contains a sample Resident Inspector's Report, which the recipient must review before completing

its Post-Delivery Purchaser's Requirements Certification. In response to comments, FTA made edits for clarity and for consistency with the regulations.

Appendix B contains sample pre-award and post-delivery certificates and forms. These samples are intended to aid recipients, manufacturers, and suppliers in complying with the 49 CFR parts 661 and 663 requirements, and these samples may be utilized and filled out by these parties, where appropriate. In response to comments, FTA made edits for clarity and for consistency with the regulations.

Appendix C contains a sample pre-award audit report and a sample post-delivery audit report, including necessary certifications and recommended supporting documentation. In response to comments, FTA made edits for clarity and for consistency with the regulations. FTA also made edits to simplify the sample reports.

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[FR Doc. 2017-00873 Filed: 1/13/2017 8:45 am; Publication Date: 1/17/2017]